(3)

No. 06-1717

In the Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY,
PETITIONER

v.

MICHAEL CHERTOFF, SECRETARY OF
HOMELAND SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412, paralegal services are "attorney fees" compensable at market rates, or "other expenses" compensable at the rate of cost to the attorney.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 472 F.3d 1370. The supplemental opinion of the court of appeals denying rehearing (Pet. App. 54a-56a) is reported at 482 F.3d 1358. The decision of the Department of Transportation Board of Contract Appeals (Pet. App. 25a-53a) is reported at 05-2 B.C.A. (CCH) ¶ 33,021.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 2006. A petition for rehearing was denied on April 3, 2007 (Pet. App. 54a-56a). The petition for a

writ of certiorari was filed on June 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner contracted with the Immigration and Naturalization Service to provide guard services for detainees at the Los Angeles International Airport. Years later the Department of Labor (DOL) determined that the contracts had misclassified petitioner's employees for purposes of the wage classification scheme of the Service Contract Act of 1965, 41 U.S.C. 351 *et seq.*, resulting in underpayment of petitioner's employees. The DOL further found that employees were entitled to back wages from petitioner. Pet. App. 2a-3a. Petitioner then filed a claim against the government for the increased costs associated with the parties' misclassification of petitioner's employees. After a series of appeals to the Department of Transportation Board of Contract Appeals and to the Federal Circuit, the Board awarded petitioner the amount of additional wages, payroll taxes, and workers compensation premiums that petitioner was required to pay. The court of appeals affirmed. *Ibid.*

2. Petitioner thereafter applied to the Board for attorney's fees, expenses, and costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504. Pet. App. 3a. EAJA authorizes an agency to award "fees and other expenses" to a "prevailing party" in adversary administrative proceedings in cases in which the position of the United States is not "substantially justified." 5 U.S.C. 504(a)(1).[1] The statute defines "fees and other ex-

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[1] A separate provision of EAJA provides for recovery of "fees and other expenses" from the United States by a prevailing party in a court proceeding. 28 U.S.C. 2412(d)(1)(A); see also 28 U.S.C. 2412(d)(2)(A) (defining "fees and other expenses").

penses" to include: "the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees." 5 U.S.C. 504(b)(1). The statute further instructs that:

> [t]he amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.[]

5 U.S.C. 504(b)(1)(A).

In its EAJA application, petitioner sought reimbursement for $51,793.75 in attorney's fees for work on the underlying cases and $14,225 in attorney's fees for time spent preparing the EAJA application. Pet. App. 5a. It also sought reimbursement for paralegal services used by petitioner's attorney. Over the course of his representation, the attorney had billed petitioner for paralegal time at rates ranging from $50 to $135 per hour. *Id.* at 3a-4a. Petitioner's EAJA application sought reimbursement, generally at these rates,[2] for 523.8 hours of paralegal work on the underlying cases

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[2] As the court of appeals noted, petitioner appeared to limit the fee request to $95 per hour for paralegal services after June 1, 2004, when the paralegal billing rate had increased to $135 per hour. Pet. App. 5a.

and 68.2 hours of paralegal work preparing the EAJA application, totaling $51,901.10 in paralegal services. *Id.* at 5a.

3. The Board awarded petitioner $43,312.50 in attorney's fees for the underlying cases and $7125.50 in fees for the preparation of the EAJA petition. Pet. App. 47a, 52a. With regard to reimbursement for paralegal fees, the Board ruled that, under EAJA, paralegal services are recoverable at the cost to the firm, not at the rate billed to the client. Finding no evidence in the record concerning the cost of paralegal services to the firm, and unwilling to deny paralegal expenses entirely, the Board took judicial notice of paralegal salaries in the Washington, D.C. area and found that $35 per hour was a reasonable cost to the firm. *Id.* at 42a-43a. The Board accordingly awarded petitioner $10,587.50 for paralegal services. *Id.* at 52a.

4. The court of appeals affirmed. Pet. App. 1a-19a. Relying on the text, structure, purpose, and history of EAJA, the court of appeals ruled that paralegal costs are not recoverable as "fees," but rather constitute "expenses" recoverable at the cost to the attorney. *Id.* at 7a-19a.

In particular, the court explained that EAJA allows for the recovery of "expenses" as well as "fees." Given the additional category, the court determined that Congress intended paralegal costs to be recoverable as "expenses" reimbursed at cost to the attorney, and not "fees." Pet. App. 15a. That construction, the court explained, was bolstered by the fact that Congress had gone out of its way to place a cap on attorney's fees, but had not done so for paralegal costs. *Id.* at 16a-17a (citing *Arlington Cent. Sch. Dist.* v. *Murphy*, 126 S. Ct. 2455, 2461 (2006)). "The allowance of paralegal fees

without a meaningful cap would," the court explained, "create a perverse incentive" for attorneys to refer work to paralegals so that they could "recover at or near the full market rate for paralegals." *Id.* at 18a.

The court of appeals acknowledged that one court had reached a different conclusion, *Jean* v. *Nelson*, 863 F.2d 759, 778 (11th Cir. 1988), aff'd on other grounds *sub nom. Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990). Pet. App. 12a. But the court declined to follow *Jean*, noting that "there was no indication that the paralegal services issue was argued" in that case. *Ibid.* The court further noted that the "short paragraph" devoted to the issue in *Jean* simply followed a previous Eleventh Circuit discussion that held paralegal services to be reimbursable under a different statute, and addressed neither the statutory text nor purpose of EAJA. *Id.* at 12a-13a.

Senior Judge Plager dissented. Pet. App. 20a-24a. He reasoned that the interpretation of EAJA should be guided by this Court's interpretation of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, and thus concluded that paralegal services should be recoverable as "attorney's fees." Pet. App. 20a-21a (citing *Missouri* v. *Jenkins*, 491 U.S. 274 (1989)).

5. The court of appeals denied a petition for rehearing en banc. Pet. App. 57a.

ARGUMENT

The court of appeals correctly concluded that, under EAJA, an award for paralegal services is limited to the cost of services to petitioner's attorney, as opposed to market rates. That conclusion is consistent with the text, structure, purpose, and history of EAJA, as well as

with this Court's precedents. Further review is not warranted.

1. The court of appeals applied settled principles of statutory interpretation in concluding that, under EAJA, paralegal time is not reimbursable at market rates as a "fee," but is rather a litigation expense to be reimbursed at cost. As the court of appeals recognized (Pet. App. 6a-7a), EAJA "renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity." *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991). "Any such waiver must be strictly construed in favor of the United States," *ibid.*, and must not be enlarged "beyond what the language requires," *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983) (citation omitted).

The language of EAJA does not require the government to reimburse paralegal costs in the same manner as attorney's fees. EAJA provides for the recovery of "fees and other expenses," but it draws a distinction between these two categories of litigation costs: Only "fees," not expenses, must be reimbursed at "prevailing market rates." 5 U.S.C. 504(b)(1)(A). As the court of appeals observed, a number of provisions of EAJA make clear that only the fees of attorneys, agents, and expert witnesses are reimbursable "fees" under the statute. Pet. App. 7a-8a (citing 5 U.S.C. 504(a)(2) and 504(b)(1)(A)). A paralegal is neither an attorney, nor an agent,[3] nor an expert witness. The plain language of the

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[3] An "agent," for purposes of 5 U.S.C. 504, is a specialized non-attorney practitioner authorized to represent clients before an administrative agency with the special permission of the tribunal. See *e.g.*, *Lane* v. *United States Dep't of Agric.*, 294 F.3d 1001, 1003 (8th Cir. 2002); *Fanning, Phillips & Molnar* v. *West*, 160 F.3d 717, 721-722

EAJA thus does not provide for market-rate recovery for paralegal services. Any argument to the contrary would enlarge the waiver of sovereign immunity beyond what the language of the statute requires.

That conclusion is bolstered by the fact that Congress specifically placed a cap on attorney's fees in EAJA, but did not place any limits on paralegal fees. See 5 U.S.C. 504(b)(1)(A); Pet. App. 16a-17a. Moreover, the cap that Congress set was plainly tied to market rates for the services of *attorneys*, not paralegals. See *id.* at 8a, 16a. As the court of appeals explained, "given that attorney's fees generally far exceed paralegal fees, it seems unlikely that Congress would have capped paralegal services at the same level as attorney's fees." *Id.* at 16a. This Court recently relied on a similar statutory anomaly in rejecting the argument that expert fees were recoverable under the attorney's fees provision of the Individuals with Disabilities Education Act. See *Arlington Cent. Sch. Dist.* v. *Murphy*, 126 S. Ct. 2455, 2461 (2006); Pet. App. 17a-18a.

As the court of appeals observed (Pet. App. 15a-16a), compensating paralegals at cost is also consistent with the central purposes of the statute. Congress enacted EAJA to encourage plaintiffs with legitimate claims to contest agency action. See *Sullivan* v. *Hudson*, 490 U.S. 877, 883 (1989). But Congress was concerned about protecting the public fisc as well as reducing economic deterrents to seeking review of government action. Thus, as the court of appeals explained, "[t]he purpose of

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(Fed. Cir. 1998); see also H.R. Rep. No. 1418, 96th Cong., 2d Sess. 14 (1980) ("An 'agent fee' may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it."). Petitioner did not argue that paralegal services should be reimbursed as "agent fees." Pet. App. 9a.

EAJA is not to reimburse all of the costs of the prevailing party but to reimburse costs only when the government's position was not substantially justified and even then to provide only for partial reimbursement." Pet. App. 16a. Accordingly, EAJA imposed caps on fee recovery, limiting reimbursable attorney's fees to $125 per hour. 5 U.S.C. 504(b)(1)(A). In this respect, EAJA differs from other fee-shifting provisions, including the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. 1988. See Pet. App. 15a.

Finally, the legislative history also indicates that paralegal services are not reimbursable at market rates. In an effort to clarify that unenumerated, "reasonable out-of-pocket expenses" are recoverable under the statute, the Senate Report on EAJA's reenactment stated that "[e]xamples of the type of expenses that should ordinarily be compensable include *paralegal time (billed at cost)* and the cost of duplicating copies of pleadings necessary for filing and service." S. Rep. No. 586, 98th Cong., 2d Sess. 15 (1984) (Senate Report) (emphasis added). The legislative history thus indicates that Congress did not intend to include paralegal services in the definition of "attorney fees," but rather intended that paralegal fees be reimbursed as expenses limited to the attorney's cost.[4]

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[4] Petitioner contends (Pet. 20) that any reliance on the Senate Report is misplaced because the report was prepared for a version of the EAJA that was passed by Congress but ultimately vetoed by President Reagan. As the court of appeals explained (Pet. App. 56a n.2), President Reagan vetoed the bill primarily because he objected to its definition of "position of the United States." The bill was modified to respond to the President's objection, and was otherwise largely unchanged when it passed in 1985. When the "operative language" of an unenacted bill is "substantially carried forward" into a later statute, this Court has indicated that the legislative history of the unenacted bill

2. Petitioner argues (Pet. 13-22) that the court of appeals' decision is "at odds with" this Court's decision in *Missouri* v. *Jenkins*, 491 U.S. 274 (1989). This is incorrect. In *Jenkins*, the Court interpreted the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. 1988, which authorizes courts to award prevailing parties in certain civil rights actions "a reasonable attorney's fee as part of the costs," to permit recovery for paralegal services. The Court reasoned that the phrase "reasonable attorney's fee" must "refer to a reasonable fee for the work product of an attorney" and thus must include "the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit." *Jenkins*, 491 U.S. at 285. The Court accordingly concluded that the statute "should compensate the work of paralegals, as well as that of attorneys." *Ibid.*

In determining the appropriate rate of compensation for paralegal services, the Court ruled that a "reasonable attorney's fee" under the statute is one that is "fully compensatory," and that "is * * * calculated on the basis of rates and practices prevailing in the relevant market." *Jenkins*, 491 U.S. at 286 (internal quotation marks and citation omitted). Therefore, the Court concluded, if the prevailing practice in the relevant market is to bill separately for paralegal services, then prevailing parties are entitled under Section 1988 to recover separately for paralegal fees, at market rates. *Id.* at 286-287.

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may be pertinent to an understanding of the statute that ultimately passed. *United States* v. *Enmons*, 410 U.S. 396, 404 n.14 (1973).

As the court of appeals explained below (Pet. App. 15a-19a), *Jenkins* does not control this case. *Jenkins* concerned a different statute with different language, structure, purpose, and history. In particular, the Civil Rights Attorney's Fees Awards Act contains no provision for recovery of expenses; the Supreme Court thus concluded that Congress must have intended for the phrase "reasonable attorney's fee" to "take account" of "expenses." *Jenkins*, 491 U.S. at 285. EAJA, in contrast, specifically provides for an award of "fees *and other expenses*," and establishes that fees alone are to be reimbursed at market rates. 5 U.S.C. 504(a)(1) and (b)(1)(A) (emphasis added); see Senate Report 15 (paralegal services recoverable under the EAJA as an expense "billed at cost"). The Supreme Court's interpretation of the phrase "reasonable attorney's fees as part of the costs" in *Jenkins* therefore does not control the interpretation of the different statutory language at issue in this case.

Moreover, *Jenkins*' valuation of paralegal time rested on the premise that the Civil Rights Attorney's Fees Awards Act was designed to provide a "fully compensatory" award to prevailing parties. 491 U.S. at 287. EAJA, by contrast, is not intended to "make the prevailing party whole," and thus limits fee recovery to what are often below-market rates. See Pet. App. 16a; see *id.* at 18a. As the court of appeals recognized, *ibid.*, to import the Court's construction of Section 1988 in *Jenkins* into the EAJA context could allow attorneys effectively to evade these below-market statutory caps by shifting work to their paralegals, whose billing rates are more likely less than, or closer to, the statutory $125-per-hour maximum recovery for attorney's fees.

3. Petitioner also argues (Pet. 8-10) that the court of appeals' decision conflicts with the decisions of four other circuits. That contention does not bear scrutiny.

Contrary to petitioner's contention (Pet. 8-9), the court of appeals' decision does not conflict with *Miller* v. *Alamo*, 983 F.2d 856, 862 (8th Cir. 1993). That case involved an award under 26 U.S.C. 7430—not EAJA—and the Eighth Circuit simply distinguished certain paralegal services from other kinds of overhead expenses that are not ordinarily recoverable under fee-shifting statutes, concluding that "[w]ork done by paralegals is compensable if it is work that would have been done by an attorney." *Alamo*, 983 F.2d at 862. Moreover, although the court awarded recovery for paralegal services at a rate of $40 per hour, it said nothing about whether paralegal services were compensable as attorney's fees or as other expenses, or whether any recovery should be at market rates rather than at cost. *Ibid.*

Hyatt v. *Barnhart*, 315 F.3d 239 (4th Cir. 2002), did involve an award under EAJA, but the court did not squarely address the question presented in this case. Rather, the Fourth Circuit simply held that, "[a]lthough fees for paralegal time *may* be recoverable under the EAJA, such fees are only recoverable to the extent they reflect tasks traditionally performed by an attorney and for which the attorney would customarily charge the client." *Id.* at 255 (emphasis added). Although, as petitioner notes (Pet. 9-10), the court used the word "fees" in connection with paralegal services, the court did not consider, much less decide, whether paralegal services are compensable as "fees" within the meaning of EAJA, or whether recovery should be at market rates rather than at cost.

Nor does the decision below conflict with *Role Models America, Inc.* v. *Brownlee*, 353 F.3d 962 (D.C. Cir. 2004). Contrary to petitioner's suggestion, the *Role Models* court did not "expressly state[]" that "paralegals and law clerks are to be compensated at their market rates" under EAJA. Pet. 10 (quoting *Role Models*, 353 F.3d at 974) (emphasis omitted). Rather, the court simply rejected the Government's argument that there should be *no* recovery for work done by non-attorneys, noting that it had "previously affirmed a fee award that 'includ[ed] paralegal time.'" *Role Models*, 353 F.3d at 974 (quoting *Oklahoma Aerotronics, Inc.* v. *United States*, 943 F.2d 1344, 1352 (D.C. Cir. 1991); citing *In re Olson*, 884 F.2d 1415, 1426 (D.C. Cir. (Spec. Div.) 1989)). The "market rate" language petitioner quotes appears merely in a parenthetical following the court's citation to *Olson*. *Olson* was not, however, an EAJA case, but a case involving 28 U.S.C. 593(f)—a statute that, like the statute at issue in *Jenkins* and unlike EAJA, provides only for reimbursement of "reasonable attorneys' fees," not the recovery of expenses. And in *Oklahoma Aerotronics*, the other case cited in the District of Columbia Circuit's opinion, the court expressly categorized an EAJA award for paralegal time as an "award of *expenses*," not an award of fees. 943 F.2d at 1352 (emphasis added).

While it is true that, in its award calculations, the District of Columbia Circuit appeared to assume that paralegal time was compensable at market rates, see *Role Models*, 353 F.3d at 969-970, it did so without discussion, and without considering whether the language, structure, purpose, or history of EAJA supports that interpretation.

Petitioner is accordingly left with *Jean* v. *Nelson*, 863 F.2d 759, 778 (11th Cir. 1988). As noted above, the Federal Circuit did decline to follow the *Jean* decision, but in doing so it stressed that "there is no indication that the paralegal services issue was argued" in *Jean*, and the "*Jean* court's discussion of paralegal services was limited to a short paragraph that addressed neither the statutory language nor the purpose of EAJA." Pet. App. 12a-13a. In *Jean*, the Eleventh Circuit cited only a Title VII case, *Allen* v. *United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. Unit B 1982), for the proposition that paralegal time is recoverable as "part of a prevailing party's award for attorney's fees and expenses" to the extent that the paralegal performs work traditionally done by an attorney. The court did not, however, explain why, even if paralegal time were recoverable under EAJA, the statute requires that paralegal services be compensated at market rates rather than at cost. There is, accordingly, no considered conflict between the Federal Circuit and the Eleventh Circuit on this issue.

In any event, because only one other circuit besides the court below has addressed the question presented in this case, and because that court has given the issue only limited consideration, the issue would benefit from further ventilation in the courts of appeals.

4. Finally, petitioner contends (Pet. 11-12) that review should be granted because the Federal Circuit's decision will have a disproportionately large impact given the nature of the Federal Circuit's docket. That contention should be rejected. Although a substantial percentage of the Federal Circuit's docket does consist of cases involving the federal government, EAJA cases

are heard in significant numbers in every circuit, and the total number of administrative and other claims involving the government that are heard by the Federal Circuit represents a relatively small percentage of similar claims heard nationwide.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Compare U.S. Court of Appeals for the Federal Circuit—*Appeals Filed, Terminated, and Pending During the Twelve Month Period Ended September 30, 2006*, Table B-8 <http://www.cafc.uscourts.gov/pdf/ao0906.pdf>, and U.S. Court of Appeals for the Federal Circuit, *Adjudications by Merits Panels, by Category, FY 2006* <http://www.fedcir.gov/pdf/ChartAdjudications06.pdf>, with U.S. Court of Appeals--*Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending March 31, 2006*, Table B-5 <http://www.uscourts.gov/caseload2006/tables/ B05Mar06.pdf>.